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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-00235

ANDERSEN MANUFACTURING, INC.,

Plaintiff,

v.

WYERS PRODUCTS GROUP, INC.,

Defendant.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P.56 and Local Rule 56.1, Defendant, Wyers Products Group, Inc. ("Wyers") by and through undersigned counsel, hereby submits this Motion for Summary

Judgment, that all original remaining original independent claims[1] and their dependent claims of U.S. Pat. No. 7,156,412 ("the '412 patent")(*Exh. A to Swanson Decl.*) and U.S. Pat. No. 7,222,510 ("the '510 patent")[2] (*Exh. B to Swanson Decl.*) are invalid as anticipated by a single prior art reference and/or rendered obvious by a combination of prior art references; that Wyers does not infringe any original claim of the '510 patent. Plaintiff also respectfully motions this Court to confirm the cancellation of all claims of U.S. Pat. No. 6,908,099 ("the '099 patent").

Certificate of Compliance with D.C.COLO.LCivR 7.1

Defense counsel discussed the grounds for this motion and the relief requested with counsel for the Plaintiff via email the week of March 5, 2018. Plaintiff's counsel opposes the relief requested herein. Defense counsel did confirm that any amended claim pending in the three pending ex-parte reexams explicitly cancels the original parent claim that is now amended. *See Exh. E to Swanson Decl.*

I. INTRODUCTION

Defendant Wyers is a Denver-area small business manufacturer of trailer hitches. Philip Wyers, the President and founder of Wyers Products Group, Inc. has received about twenty-five patents over the past twenty years on related products. *See Wyers Decl. ¶ 1–2.*

[1] Counsel for Andersen confirmed that any amended claims are no longer being asserted as original claims. Because a Certificate of Reexamination has not issued on any of the patent claims of the patents at issue, no amended claims can be asserted in this case as they are not "patented".

[2] The United States Patent and Trademark Office (USPTO) issued a final office action against U.S. Pat. No. 6,908,099 ("the '099 patent") *(Exh. C to Swanson Decl.)* on August 31, 2017. Plaintiff did not respond to this final office action. A Notice to Issue a Reexamination Certificate cancelling all original and amended claims issued on March 13, 2018. The '099 patent is no longer asserted in this case. *Exh. D to Swanson Decl.*

STATEMENT OF NON-DISPUTED FACTS

Presently all original claims of all three asserted patents are held invalid in three separate ex-parte reexams filed by Wyers. Wyers has filed the following reexaminations related to the above patents: Reexam. Control No. 90/020,105 filed September 8, 2016 (on the '510 patent); Control No. 90/013,754, filed August 16, 2016 (on the '412 patent) ("the '754 proceedings"); and Control No. 90/013,901, filed February 4, 2017 (on the '412 patent) ("the '901 proceeding"). The '412 proceedings were merged into control Nos. 90/013,754 and 90/013,901. The '412 patent stands with all original claims rejected in a Final Office Action, with only one original independent claim remaining. The '510 patent reexamination proceeding stands with a non-final action rejecting all original claims as of March 3, 2017. Plaintiff filed a response to the March 3, 2017 office action but the Patent Office is yet to take further action on the matter. Plaintiff has stipulated that the '099 patent is invalid and cancelled. *See Exh. E to Swanson Decl.*

The '099 patent and the '412 patents were asserted in at least two other cases. *See Andersen Manufacturing, Inc. v. Diversi-Tech Corp.,* Case No. 2:05-cv-00923 (D. Utah filed Nov.4, 2005) and *Andersen Manufacturing Inc. v. Diversi-Tech Corp.,* Case No. 2:07-cv-00088 (D. Utah filed Feb. 15, 2007) (collectively, "Prior Andersen Litigation"). Andersen dismissed both these cases after losing Motions for Preliminary Injunctions in which the District of Utah specifically referenced issues of validity of the '412 patent and the '099 patent. *See Exhs. G–J to Swanson Decl.*

SUMMARY OF RELIEF REQUESTED

Wyers is motioning this Court to rule the remaining non-amended, original claims invalid for both of the remaining patents ('412 and '510). Wyers moves this Court to rule that Wyers does not infringe any non-amended, original claim of the '510 patent. In ruling on the invalidity,

this Court will be in essence adopting the USPTO holdings of invalidity of all original claims and dismissing the present case with prejudice. Should Andersen succeed in obtaining a new or amended claim (from the hundreds of new claims it has filed or amended), then Andersen can file a new lawsuit seeking adjudication of the new claims. In contrast to Andersen's counsel's statement at the recent status conference before this Court, it is readily apparent that the amended and new claims introduced by Andersen are dramatically different, introduce a plethora of new terms, and will require another Claim Construction process, another cycle of invalidity contentions, and another cycle of infringement contentions. In essence Plaintiff wants to drag this case on in the face of having not a single original claim noted in the complaint, any longer valid. Wyers is motioning this Court to shut this case down.

BACKGROUND

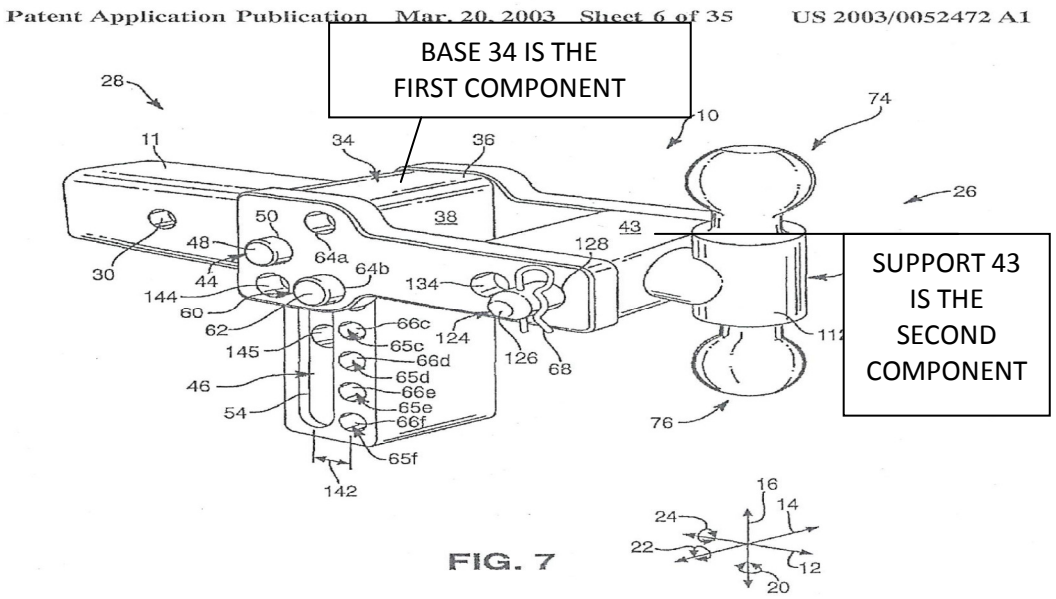
On or about January 2008 Wyers offered a vertically adjustable hitch made of steel. On or about January 2012 Wyers offered an aluminum version of the steel product trademarked the "Razor" as shown in *Exh. H to Wyers Decl.* In January 2012 equivalent aluminum vertically adjustable hitches were being sold by Diversi-Tech Corp. By that time Plaintiff herein, Andersen Manufacturing, Inc. (Andersen) had lost a Motion for Preliminary Injunction against Diversi-Tech on Andersen's U.S. Pat. No.7,156,412. *See Exh. H to Swanson Decl.* Andersen had also lost a Motion For Preliminary Injunction against Diversi-Tech on U.S. Pat. No. 6,908,099. *See Exh. F to Swanson Decl. at Bates No. ANDERSEN0000824.* In the Diversi-Tech case the District of Utah set forth that the only significant novelty claimed by Andersen is the fact that the trailer hitch drop bar described in the '412 patent is made of aluminum alloy. *Exh H to Swanson Decl. at Bates No. 1261–1262.* The United States Court of Appeals for the Federal Circuit (CAFC)

affirmed the denial of preliminary injunction on the '412 patent without opinion. *See Exh. I to Swanson Decl.*

The District of Utah held that by Andersen's own admission in the '412 description, aluminum alloy was already known to the prior art in aircraft manufacture. Moreover, there is abundant evidence of aluminum already being used in the trailer hitch industry. The District of Utah Court cited U.S. Pat. Nos. 6,129,371 and 6,464,240 (*Exhs. K and L to Swanson Decl.*) in making this determination.

Also part of the prior art history of the now cancelled '099 patent was Moss '472 (United States Patent Publication No. 2003/0052472). *See Moss '472 at Exh. M to Swanson Decl*. The '099 patent was filed on November 27, 2002 which is the same day the '412 patent was filed by Andersen. *Id.*

Paragraph 0057 of Moss '472 reads, "In certain embodiments of the present invention, the apparatus 10 and the components thereof are made of steel, however, ***ALUMINUM***, ferrous alloys, or any other material possessing sufficient strength and durability may be used". (emphasis added). Andersen failed to bring Moss '472 and the vertically adjustable hitch numbered "10", as pictured below, to the attention of the District Court Judge, Dee Bensen, in Andersen's Motion for Preliminary Injunction.



Thus, the District of Utah did not have the opportunity to rule that '412 was anticipated and rendered invalid per 35 U.S.C §102(e). The District of Utah denied Andersen's Motion on alternate grounds that Andersen was unlikely to succeed as '412 faced further issues of invalidity as obvious in view of U.S. Pat. Nos. 6,129,371 and 6,464,240, *Supra.* After the **CAFC** affirmed, Andersen dropped all litigation against Diversi-Tech, and the District of Utah dismissed the case with prejudice. *Exh. J to Swanson Decl.*

Plaintiff has been well aware of Wyers's assertions of invalidity and non-infringement since the start of this case. At the outset of this litigation Wyers notified Andersen that it does not infringe any of the method claims at issue in '510 and '099 because Wyers does not extrude aluminum in a profile in a shape of a drop bar. Wyers utilizes an extrusion in the shape of an I-beam and machines the I-beam into drop bars. *See Exh. G to Wyers Decl.* Andersen has further been on notice since the Diversi-Tech litigation that its patents face serious issues of invalidity in light of the Moss '472 publication discussed above.

Wyers has repeatedly attempted to stay this litigation to allow the USPTO to finalize the reexamination of the Andersen patents; however, Andersen has vehemently opposed these stay motions. In doing so, Andersen required the District of Idaho to conduct claim construction proceedings on the original claims, all of which the USPTO has determined to be invalid. Andersen itself undertook extensive discovery, including deposing Wyers's owner, Phil Wyers, all to determine potential infringement and damages as pertain to the original claims, each of which as of now has been invalidated by the USPTO. This is all public record. See for example the most recent amendments to the claims of the '412 patent[3] on March 2, 2018, as *Exh. N to Swanson Decl.*

However, Andersen still does not have any certificates of reexamination confirming any original claims, cancelling any claims, or granting any new or amended claims. Consequently the original claims are still asserted against Wyers, to the extent Andersen has not confirmed their withdrawal. Andersen notified Wyers that it is not withdrawing any claims of infringement of any non-amended claims. *See Exh. E to Swanson Decl.* Wyers thus moves this Court for a ruling of invalidity of the remaining original claims of the '412 Patent and invalidity and/or non-infringement of the remaining original claims of the '510 patent in order to shut this case down with prejudice.

[3] In contrast to Andersen's counsel's representation at the telephonic status conference on March 1, 2018 that only minimal amendments have been made, it is clear from the amount of underlining, "new claims", and deleted text that these amendments are in fact substantial. There are more than double the number of terms, which will create the need for an entirely new claim construction process if any of these claims ever is granted via a reexamination certificate.

THE '412 PATENT

The original claims of the '412 patent claimed in essence a two-component vertically adjustable trailer hitch made of aluminum. Andersen did not claim to have invented the two-component vertically adjustable hitch, and in a deposition in the DiversiTech case admitted that the novelty was in the use of aluminum rather than steel. This Court can adopt the Patent Office holdings that Moss '472, alone or in combination with other references, invalidates all the '412 original claims. Andersen has acknowledged this in its email correspondence between counsel. Andersen counsel specifically stated it is a "waste of court resources" to litigate the amended patent claims in light of the fact that they no longer exist in original form. However, as the Court can see original claims 21 and 22 continue in existence. Claims 21 and 22 recite as follows:

21. A stepped drop bar insertion into a hitch adapter of a motorized vehicle, the stepped drop bar comprising:
a first component of the stepped drop bar having an end comprising solid aluminum, wherein the end is configured with outside dimensions which permit insertion of the end into the hitch adapter of a motorized vehicle for towing; and
a second component of the stepped drop bar that is selectively coupled to the first component to provide a vertical adjustment of the stepped drop bar.

22. A stepped drop bar as recited in claim 21, wherein the end is a standard two inch square end.

The above Fig. 7 of Moss '472 has been annotated to clearly show the "first component" as item 34 "base" having "trunnion" 11, and the second component as the "support" 43 (see ¶ 0075 of Moss '472).

In the reexamination proceeding filed by Wyers, the USPTO issued rejections that would invalidate all original claims of '412 in an Office Action dated July 03, 2017, *Exh. O to Swanson Decl.* Andersen in turn amended each of independent claims of '412 but for claims 21 and 22,

which remain under rejection by the USPTO. Wyers respectfully requests this Court to similarly rule all of the original claims are invalid, namely claims 21 and 22, in essence agreeing with the findings of the USPTO.

As apparent in *Exh. N to Swanson Decl.,* the remaining amended independent claims have substantial new amendments, while only original claims 21 and 22 are left. These amended claims and any pending new claims have not issued nor are they relevant to this Motion. Wyers's present Motion seeks to simply close down the present case with prejudice. The court proceedings to this point, including the claim construction proceedings and claim construction order (Dkts. 060 and 065) are not applicable to the new and amended claims which have approximately doubled the number of words and terms that need to be construed in this case. Should any of the remaining Andersen patents emerge with new and/or amended claims for any of the asserted patents under reexaminations, Andersen could file a new lawsuit, if and only if Wyers makes an infringing product. Clearly past damages and willfulness are dead issues in the present case.

THE '510 PATENT

In its reexamination proceeding, U.S. Pat. No. 7,222,510 has all original claims rejected rendered unpatentable as obvious (pre-AIA 35 U.S.C. 103 (a)) over Moss '472 (*Exh. M to Swanson Decl.*) in view of Kusaka U.S. Pat. No. 5,398,411 (*Exh. P to Swanson Decl.*).

The non-final rejection of all original dated March 3, 2017 claims 1-17 is provided as *Exh. Q to Swanson Decl*. Once again the Examiner at pages 9-14 has held that the Moss '472 hitch apparatus 10, noted above, could be made of aluminum as stated at paragraph 0057 of Moss '472.

Kusaka teaches the well- known method of manufacturing a Moss-like suspension member by extruding aluminum. *See pages 11-12 of Exh. Q to Swanson Decl.*

> From the teachings of Kusaka, one of ordinary skill in the art at the time of the invention would have found it obvious to manufacture the aluminum drop bar of moss '472 (the monolithically-formed base, mount, and fastening portion components described therein) using the steps of extruding billet aluminum through a die to produce a profile in the desired shape of a stepped and/or extended drop bar; making a plurality of parallel cuts through the profile to provide a plurality of drop bars; and machining a first drop bar to configure a receiving portion for a ball for coupling thereto. This would require little more than the applying a known technique (manufacturing relatively complex structural members by extruding a profile and cutting it into a plurality of products as taught by Kusaka) to a known device (the drop bar of Moss '472) in order to simplify the process of manufacturing a plurality of substantially identical and accurately produced drop bars. As further taught by Kusaka, extruding and cutting the drop bars of Moss '472 using such a method would yield the predictable result of reducing the cost of manufacturing the drop bars as compared to other methods.

Of particular interest for the '510 "method" patent for extruding a well- known invention (Moss '472) is that the '510 claims in essence the identical inventions as Andersen's **NOW CANCELLED** U.S. Pat. No. 6,908,099. Thus, the invalidity of '510 should rise or fall concurrently with '099, which Andersen has already admitted has fallen. Below is shown a side-to-side claim comparison of cancelled '099 and not yet cancelled '510 claims. As the Court can see, no significant differences exist.

Patent No.: US 6,908,099 B2

What is claimed is:

1. A method for manufacturing drop bars that are configured to be coupled to vehicles for towing, the method comprising;

extruding billet aluminum through a die to form a profile in a shape of an extended drop bar;

cutting the extended drop bar profile to provide a plurality of drop bars that are configured to be coupled to vehicles for towing; and

machining a first drop bar to configure a receiving portion that is configured to receive a ball for coupling thereto, wherein the first drop bar is one of the plurality of drop bars.

Patent No.: US 7,222,510 B2

What is claimed is:

1. A method for manufacturing a drop bar used in towing, the method comprising:

extruding aluminum through a die to form a profile in a shape of a drop bar;

cutting the drop bar profile to provide one or more drop bars that are configured to be used for towing;

configuring an end of a first drop bar with outside dimensions which permit insertion of the end of the first drop bar into a hitch adapter, the first drop bar being one of the one or more drop bars; and

providing a coupling mechanism to maintain the first drop bar coupled to the hitch adapter.

11. A method for manufacturing a stepped drop bar that is configured to be selectively coupled to a vehicle for use in towing, the method comprising:

extruding billet aluminum through a die to form a profile in a shape of an extended and stepped drop bar;

cutting a plurality of parallel cuts through the extended and stepped drop bar profile to provide a plurality of drop bars;

machining near a proximal end of a first stepped drop bar to configure a receiving portion that is configured to receive a ball for coupling thereto, wherein the first drop bar is one of the plurality of drop bars; and

machining near a distal end of the first stepped drop bar to configure the first stepped drop bar to be selectively coupled to a vehicle for use in towing.

The words "extended and stepped" are not in the specification and were added during patent prosecution. Therefore, they are meaningless or they would violate the "new matter" rule.

5. A method for manufacturing drop bars that are configured to be coupled to vehicles for towing, the method comprising:

extruding billet aluminum through a die to form a profile in a shape of an extended drop bar;

cutting the extended drop bar profile to provide a plurality of drop bars that are configured to be coupled to vehicles for towing; and

configuring a receiving portion of a first drop bar to receive a ball for coupling thereto, wherein the first drop bar is one of the plurality of drop bars; and

configuring an end of the first drop bar to have outside dimensions which permit insertion of the end of the first drop bar into a hitch adapter, wherein the end of the first drop bar is removably coupled to the hitch adapter.

9. A method for manufacturing a stepped drop bar that is configured to be selectively coupled to a vehicle for use in towing, the method comprising:

extruding billet aluminum through a die to form a profile in a shape of an extended and stepped drop bar;

cutting a plurality of parallel cuts through the extended and stepped drop bar profile to provide a plurality of drop bars;

machining near a first end of a first stepped drop bar to configure a receiving portion that is configured to receive a ball for coupling thereto, wherein the first drop bar is one of the plurality of drop bars; and

machining near a second end of the first stepped drop bar to configure the first stepped drop bar to be selectively coupled to a vehicle for use in towing.

13. A method for manufacturing drop bars that are configured to be coupled to vehicles for towing, the method comprising:

extruding billet aluminum through a die to form a profile in a shape of an extended drop bar;

cutting the extended drop bar profile to provide a plurality of drop bars that are configured to be coupled to vehicles for towing;

configuring a first drop bar to include a receiving portion that is configured to receive a ball for coupling thereto, wherein the first drop bar is one of the plurality of drop bars; and

configuring an end of the first drop bar to have outside dimensions which permit insertion of the end of the first drop bar into a hitch adapter, wherein the end of the first drop bar is removably coupled to the hitch adapter.

16. A method for manufacturing stepped drop bars that are configured to be coupled to vehicles for towing, the method comprising:

extruding billet aluminum through a die to form a profile in a shape of an extended and stepped drop bar;

cutting the extended and stepped drop bar profile to provide a plurality of stepped drop bars that are configured to be coupled to vehicles for towing; and

configuring a receiving portion of a first drop bar to receive a ball for coupling thereto, wherein the first drop bar is one of the plurality of drop bars.

> **17.** A method for manufacturing stepped drop bars that are configured to be coupled to vehicles for towing, the method comprising:
>
> extruding billet aluminum through a die to form a profile in a shape of a stepped drop bar;
>
> cutting the drop bar profile to provide a plurality of stepped drop bars that are configured to be coupled to vehicles for towing;

In fact, Andersen even filed a terminal disclaimer to overcome a double patenting rejection between the '510 patent and the '099 patent. *Exh. T to Swanson Decl.* While this terminal disclaimer does not provide a presumption of invalidity, it does provide a "strong clue" that the claims are patentably indistinguishable. *See the precedential opinion of Simpleair, Inc. v. Google, LLC, 2016-2738, Fed. Circ. March 12, 2018 at page 11–12 (attached as Exhibit 1).* In the instant case, this strong clue coupled with the virtually identical nature of the patent claims (shown above) provides the evidence necessary to invalidate all of the original '510 claims over the same rejections that invalidated the '099 patent.

THE LAW

Legal Standards Governing Summary Judgment

Summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). While the burden of demonstrating the absence of any material factual dispute rests with the moving party, to defeat a summary judgment motion the nonmoving party must do "more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986). Instead, the nonmoving party must set forth "specific facts showing that there is a genuine issue for trial." *Id*. at 587.

I. Wyers is entitled to Summary Judgment because each of the asserted Andersen patents is invalid as a Matter of Law as anticipated and/or obvious.

The Patent Act rewards and encourages invention. As a result, claimed invention must be novel, 35 U.S.C.§ 102, and patents cannot be obtained on matter that would obvious subject matter, 35 U.S.C. § 103. Each of the asserted original claims of the '412 patent are invalid under § 102 (e) because an aluminum vertically adjustable trailer hitch was already described in Moss '472. A second reason for invalidity is obviousness per § 103. Plaintiff's substitution of aluminum for another metal in previously known two-component vertically adjustable hitches in view of similar aluminum parts is obvious under § 103. Plaintiff's method of extruding an aluminum hitch in '510 is a mere use of a known process to create a known product under and therefore obvious under § 103.

A. Plaintiff's remaining original asserted claims of the '412 patent are invalid under 35 U.S.C. 102 because Moss, US Patent Publication No. 2003/052472 anticipates each element of its claims.

"Anticipation under 35 U.S.C. §102 means lack of novelty, and is a question of fact." *Brown v. 3M, 265 F.3d 1349 (Fed. Cir. 2001) (internal citations and quotations omitted) (upholding district court's grant of summary judgment of invalidity under 35 U.S.C. 102)*. A patent claim is invalid as anticipated if each and every limitation is found either expressly or inherently in a single prior art reference. *Celeritas Tech., Ltd. v. Rockwell Int'l Corp.,* 150 F.3d 1354, 1361 (Fed.Cir.1998). Pre America Invents Act 35 U.S.C § 102(e)(1) provides that patent applications filed in the U.S. become prior art as of the filing date (as opposed to the publication date).

Claim 21 of the '412 recites as follows:

21. A stepped drop bar insertion into a hitch adapter of a motorized vehicle, the stepped drop bar comprising:

a first component of the stepped drop bar having an end comprising solid aluminum, wherein the end is configured with outside dimensions which permit insertion of the end into the hitch adapter of a motorized vehicle for towing; and

a second component of the stepped drop bar that is selectively coupled to the first component to provide a vertical adjustment of the stepped drop bar.

Moss, U.S. Patent Pub. No. 2003/0052472 (*Exh. M to Swanson Decl.)* was filed on June 5, 2002, thus having a filing date pre-dating each of the asserted patents earliest priority date (November 27, 2002). Consequently Moss '472 is prior art to each of the asserted patents under 35 U.S.C. § 102(e).

Moss discloses a first component (34 in Figures 1, 2 and 7 of Moss) having an end comprising solid aluminum (11 in Figure 1 and 2 of Moss) (Moss paragraph 0057 "[i]n certain embodiments of the present invention, the apparatus 10 and the components thereof are made of steel, however aluminum, ferrous alloys, or any other material possessing sufficient strength and durability may be used.") Moss states "trunnion 11 may have any suitable cross section and length." Hence the end (trunnion) 11 of Moss includes a solid cross section. Moss further states that the trunnion is "for insertion into a receiver tube or cavity of a vehicle."

Moss further discloses a second component (shown as mount 40 in Figures 1 and 2 of Moss and "support" 43 in Fig.7 noted above). The mount 40 is "selectively coupled to the first component to provide a vertical adjustment of the stepped drop bar" as shown by the movement of Moss between Figures 1 and 2. Accordingly, Moss anticipates each of the claim limitations of Claim 21 of the '412 patent.

Claim 22 of the '412 recites as follows:

22. A stepped drop bar as recited in claim 21, wherein the end is a standard two inch square end.

Again at paragraph 56 Moss states "[t]he trunnion may have any suitable cross section and length." Further the '412 expressly acknowledges that the standard receiver, called a

"receiver tube" in Moss, is a 2 inch receiver. Because Moss anticipates all elements of claims 21 and 22, claims 21 and 22 are invalid as a matter of law under 35 U.S.C. 102(e). This is the same argument provided by the USPTO in rejecting Claims 21 and 22, Wyers respectfully requests this Court adopt the same ruling.

B. Invalidity Under 35 U.S.C. §103 as an alternate proof of invalidity

A patent is invalid for obviousness "if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains." 35 U.S.C. § 103(a). The U.S. Supreme Court set forth the framework for determining if a claimed invention is obvious in *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, (1966). A patent is invalid as obvious if it merely claims a predictable combination of elements of prior art in accordance with their established functions. *See generally, KSR International Co. v. Teleflex Inc.,* 550 U.S. 398, 417-418 (2007). A "district court can properly grant, as a matter of law, a motion for summary judgment on patent invalidity when the factual inquiries into obviousness present no genuine issue of material facts." *Ryko Mfg. Co. v. Nu-Star, Inc.,* 950 F.2d 714, 716 (Fed. Cir. 1991). The Utah Court held '412 probably invalid as obvious in view of Exhibits M and N noted above.

Furthermore, substitution of materials has been held unpatentable dating at least to the 1851 U.S. Supreme Court Case of *Hotchkiss v. Greenwood*, 52 U.S. 248 (1851) (holding unpatentable the substitution of clay or porcelain for another material in making a door knob). Similarly in 1890 the Commissioner of Patents held unpatentable the substitution of aluminum for steel in making a bicycle frame. *See, e.g., Ex Parte Grayson and Crecelius*, 68 O.G. 1021, C.D. 1894, attached as *Exh. R to Swanson Decl.*

1. Claims 21 and 22 of the '412 patent are invalid as obvious because they are no more than the substitution of aluminum for steel in a vertically adjustable hitch.

In this instance the facts are clear. The structure of a two-component vertically adjustable hitch as claimed in claims 21 and 22 was described in Moss '472. The Moss '472 patent application is a continuation-in-part of an earlier application, a second Moss reference, US Patent Publication No. 2002/0113405. The '405 publication discloses a two-component vertically adjustable trailer hitch at Figure 2. Each of these Moss references contains a first component (as discussed above for Moss '472 and at reference number 36 in the '405 Moss). Each contains "a second component of the stepped drop bar that is selectively coupled to the first component to provide a vertical adjustment of the stepped drop bar" (as discussed above for Moss '472 and at reference number 38 for '405 Moss). Plaintiff argued to the USPTO that the Moss '405 reference conflicted with the disclosure of using aluminum, but the USPTO held that a continuation-in-part defines "new matter" and rejected Plaintiff's argument. Plaintiff has since cancelled all original claims of the '412 but for claims 21 and 22.

The '412 patent states the aluminum "comprises an aircraft quality aluminum alloy. As provided herein, other embodiments of aluminum alloys include high strength aluminum alloys, such as 6061-T6, 7075-T6, 7079-T6, 7178-T6, and the like." Andersen's statement is an admission that these aluminum alloys were well known in the industry at the time Andersen filed its patents.

Claims 21 and 22 of the '412 patent are obvious as a matter of law. There is no factual dispute as to what each Moss reference discloses nor is there any factual dispute as to what the Andersen '412 patent discloses. A person having ordinary skill in the art would easily substitute aluminum for steel in manufacturing an already known vertically adjustable hitch. This is particularly true in light of Andersen's own statements that "[t]hose having skill in the art will

appreciate that a hitch component, such as drop bar 30 that comprises aluminum will not rust." The '412 patent at column 5 lines 51–54 continues "[m]oreover, at least some embodiments of the present invention are lighter and/or stronger than traditional hitch components because of the use of aluminum." *Id at lines 64-67.* Thus Andersen used a known material [aluminum and/or alloys] to make a known hitch [of either Moss patents] to obtain expected results [increased tensile strength, does not rust, is lighter, and is more appealing to consumers (see '412 abstract on first page)]. Andersen's claimed novelty and inventiveness in the use of aluminum is further belied by Andersen's statement that "those skilled in the art will appreciate that other materials that may be used in accordance with the present invention, wherein the material is forced through a die to obtain a particular shape and would have the strength necessary for use as at least a portion of a hitch component." Thus even Andersen itself acknowledges that other materials can be used and nothing is special about aluminum, beyond the expected properties that it is lighter than steel and will not rust.

C. The original and still asserted claims of the '510 patent are invalid as obvious over Moss '472 in view of the admitted prior art in the '510 patent, U.S. Patent No. 3,321,950 to Gettig, or U.S. Patent No. 5,398,411 to Kusaka.

As discussed above each of the Moss patents discloses a vertically adjustable hitch with the '472 publication setting forth that the vertically adjustable hitch is made of aluminum. While the vertically adjustable aluminum apparatus claimed in '412 was disclosed in Moss '472. The aluminum extrusion process to make the Moss '472 hitch was obvious to try per KSR, see Kusaka, Gettig, and even the disclosure of the '510 patent itself. It did not take any particular skill to realize the two might be combined.

The '510 patent at column 4, lines 17–22 that "[t]hose skilled in the art will appreciate that a variety of extruded shapes may be produced by a variety of different configurations/shapes

of the die openings. Moreover, complex shapes may be obtained using complex openings." Thus Andersen expressly admits that a person having ordinary skill in the art would know to extrude the constituent parts to obtain an aluminum hitch. Andersen later admits that "those skilled in the art will appreciate that embodiments of the present invention embrace all types of components that may be used in association with a hitch, wherein the components include aluminum and undergo a manufacturing process, such as an extrusion process, a forging process, a casting process and/or a machining process; '510 at column 6, line 4–11. Thus Andersen admits that the extrusion process is nothing new; it is simply another process by which aluminum parts are manufactured.

In addition to Andersen's own admissions, Getting and Kusaka both describe extruding a material in a profile and subsequently cutting that profile into a series of individual parts. See Getting, U.S. Patent No. 3,321,950, *Exh. S to Swanson Decl.* and Kusaka U.S. Pat. No. 5,398,411, *Exh. P to Swanson Decl.* Specifically Getting at column 1 lines 15-26 details extruding a material into a "stock", called a profile in Andersen, and "separating," called "cutting" in the '510 patent, the stock to "provide a plurality of individual members."

As detailed in the USPTO Office Action detailed supra, Kusaka details a process including the "steps of forming a base material for the suspension member by an extrusion, and cutting the base material along planes spaced at an equal distance form onto another in an extruding direction to provide a plurality of the suspension members." *See Kusaka Abstract; column 2 line 28–35; column 4 line 44–column 5 line 18 (describing in detail the process of extruding aluminum and cutting into a plurality of parts).* Thus under both Kusaka and Getting, as well as specifically stated throughout the Andersen patents, extrusion of aluminum into a

profile having a shape of a part, then cutting into individual parts (such as drop bars) is well known.

As admitted in the '510 patent, extrusion is equivalent to other aluminum part manufacturing processes. Consequently, even though the extrusion of aluminum method is not expressly taught in Moss '472, it is common sense to use such method in this context. *See Wyers v. Master Lock Company, 616 F.3d 1231, 1239 (Fed. Cir. 2010) (holding that the ultimate question of motivation could boil down to "common sense" appropriate for resolution on summary judgment); SIBIA Neurosciences, Inc. v. Cadus Pharm. Corp., 225 F.3d 1349, 1356 (Fed. Cir. 2000) ("[i]n appropriate circumstances a single prior art reference can render a claim obvious" if there is a showing of a suggestion or motivation to modify the teachings of that reference)*. Indeed, using an aluminum extrusion method was known to the inventor in the Andersen patents, and Andersen expressly admitted it would be known to one of ordinary skill in the art.

II. Wyers does not infringe on any claims of the '510 Patent because Wyers does not "extrude billet aluminum through a die to form a profile in a shape of a [ ] drop bar".

The question of infringement is particularly amenable to summary judgment where, as here, there is no material dispute over the relevant facts regarding the accused technology. *Gen. Mills, Inc. v. Hunt-Wesson, Inc.*, 103 F.3d 978, 980-81 (Fed. Cir. 1997). A patent infringement analysis involves two steps: (1) claim construction, and (2) application of the properly construed claim to the accused product or method. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995) (*en banc*), *aff'd*, 517 U.S. 370 (1996). "Summary judgment of noninfringement is proper when no reasonable jury could find that every limitation recited in a properly construed claim is found in the accused device either literally or under the doctrine of equivalents." *Advanced Steel Recovery, LLC v. X-Body Equipment, Inc. 808 F.3d 1313, 1317*

(Fed. Cir. 2015). In this case Wyers does not literally infringe nor infringe under the doctrine of equivalents because Wyers does not "extrude aluminum in a shape of a drop bar."

A. Each remaining original independent claim of the '510 patent require the step of "extruding [ ] aluminum through a die to form a profile in a shape of a [ ] drop bar."

Dependent claims are not infringed when independent claims are not infringed. *Kim v. ConAgra Foods, Inc., 465 F.3d 1312, 1316, n. 1 (Fed. Cir. 2006)*. Independent claim 1 of the '510 patent requires the step of "extruding aluminum through a die to form a profile in a shape of a drop bar." *Column 7 lines 29–30*. Each remaining original independent claim of the '510 patent requires a variation of this step. Claim 5 requires the step of "extruding *billet* aluminum through a die to form a profile in a shape of an *extended* drop bar." *Id. at lines 50–51 (emphasis to show differences from Claim 1)*. Claim 9 requires the step of "extruding *billet* aluminum through a die to form a profile in a shape of an *extended and stepped* drop bar. *Id. at Column 8 lines 9–10*. Claim 13 requires the step of "extruding *billet* aluminum through a die to form a profile in a shape of an *extended* drop bar." *Id. at lines 33–34*. Claim 15 requires the step of " extruding aluminum through a die to form a profile in a shape of a *stepped* drop bar." *Id. at lines 52–53*. Claim 16 requires the step of "extruding *billet* aluminum through a die to form a profile in a shape of an *extended and stepped* drop bar." Id. at lines 60–61. Lastly, Claim 17 requires the step of "extruding *billet* aluminum through a die to form a profile in a shape of a *stepped* drop bar." *Id. at Column 9 lines 4–5*.

For convenience these steps combined will be referred to as "extruding [ ] aluminum through a die to form a profile in a shape of a [ ] drop bar" with the brackets omitting the general material that varies between the claims.

B. The District of Idaho construed the term "drop bar" and determined that the remaining terms shall "carry their ordinary meaning without further definition."

The Court construed drop bar as meaning "a hitch component that connects a hitch adapter to a trailer where the hitch adapter and the part of the trailer that receives the hitch are at different heights." *Claim Construction Order, Dkt 065 at p. 7*. The Court declined to construe the reminder of the terms in this step, instead stating that the terms would "carry their ordinary meaning." *Id. at 12–13*.

C. Wyers does not literally practice the step of "extruding [any] aluminum through a die to form a profile in a shape of [any] drop bar."

"Direct infringement requires a party to perform or use each and every step or element of a claimed method or product." *BMC Resources, Inc. v. Paymentech, L.P., 498 F.3d 1373, 1378–1379 (Fed. Cir. 2007) (citing Warner-Jenkinson Corp. v. Hilton Davis Corp., 520 U.S. 17, 117 S.Ct. 1040, 137 L.Ed.2d 146 (1997); See also Joy Techs., Inc. v. Flakt, Inc., 6 F.3d 770, 773 (Fed. Cir. 1993) (For process patent or method patent claims, infringement occurs when a party performs all of the steps of the process)*. Further, dependent claims are not infringed when independent claims are not infringed. *Kim v. ConAgra Foods, Inc., 465 F.3d 1312, 1316, n. 1 (Fed. Cir. 2006)*.

In distinct contrast to the claimed step of "extruding [ ] aluminum through a die to form a profile in a shape of a [ ] drop bar," the extrusions utilized by Wyers are in the shape of an I-beam or in the shape of a ball mount. *Wyers Decl. at ¶¶12, 13, 14, 15.* I-beams and ball mounts are not "a profile in a shape of a drop bar." No reasonable jury could hold otherwise.

Andersen's own statements to the Court belie its infringement argument. Andersen previously stated that Wyers' I-beam extrusion has a "profile in the shape of a drop bar" because the extrusion maintains a common, unaltered side with the final product. *See Exh. T to Swanson Decl.* However, the District of Idaho specifically recognized that Andersen did not believe a

"ubiquitous brick extrusion" had a profile in the shape of a drop bar. *Markman Order, Dkt 065 at p. 9–10*. Thus not every profile can have a shape of a drop bar, regardless of whether a single side remains unaltered or not. The profile need have the shape of "a hitch component that connects a hitch adapter to a trailer where the hitch adapter and the part of the trailer that receives the hitch are at different heights." No reasonable jury could find an I-beam as having "a profile in a shape of a drop bar." Andersen "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. at 586. See photos of the Wyers extruded I beams in the Claim Construction Order (Dkt. 65 at p. 8) and *Exhs. A and B to Wyers Decl.*

D. Wyers does not infringe under the doctrine of equivalents because it does not extrude a profile equivalent to a "profile in a shape of a drop bar."

While infringement under the doctrine of equivalents is a question of fact, [w]here the evidence is such that no reasonable jury could determine two elements to be equivalent." *Warner-Jenkinson*, 520 U.S. at 39 n.8. Further, "all claim limitations are not entitled to an equal scope of equivalents." *Moore USA, Inc. v. Standard Register Co*., 229 F.3d 1091, 1106 (Fed. Cir. 2000) ("many limitations warrant little, if any, range of equivalents.") The Doctrine of equivalents is further limited in that "if a theory of equivalence would entirely vitiate a particular claim element, partial or complete judgment should be rendered by the court . . . ." *Warner-Jenkinson*, 520 U.S. at 39 n.8.

The claims at issue expressly call for "extruding [ ] aluminum through a die to form a profile in a shape of a [ ] drop bar." No other profile but that "in the shape of a [] drop bar suffices to meet this limitation. Accordingly, there is no equivalent shape to that of a drop bar. Thus Wyers' I-beam shape is not a "profile in the shape of a [] drop bar" literally nor does it infringe under the doctrine of equivalents.

CONCLUSION

Andersen should have filed its own defensive ex-parte reexams before filing this lawsuit against Wyers. Andersen learned that its claims for '099 and '412 were invalid back in the Diversitech cases. Andersen (mysteriously) failed to bring forth to the Utah Court how the '412 claims were anticipated by Moss '472; however, now the USPTO has held that all original claims of the '412 are anticipated by Moss '472.

Andersen has clearly made this an exceptional case of litigation harassment with clearly invalid patents. Wyers also respectfully requests a holding of non-infringement on all original claims of '510 (an I-beam is not in the shape of a drop bar).

DATED THIS 30th day of March, 2018

Respectfully submitted,

s/Rick Martin _____
Rick Martin
s/Scott Swanson
Scott D. Swanson
Attorneys for Defendant

EXHIBIT LIST FOR SWANSON DECLARATION

A	U.S. Patent No. 7,156,412 ('412 patent)
B	U.S. Patent No. 7,222,510 ('510 patent)
C	U.S. Patent No. 6,908,099 ('099 patent)
D	Notice of Intent to Issue a Reexamination Certificate for '099 patent
E	Email communication between Lauren Keller Katzenellenbogen and Scott Swanson regarding summary judgment motion
F	Transcript of Hearing denying Andersen's motion for preliminary injunction in previous Andersen litigation
G	Order denying Andersen's motion for preliminary injunction in previous Andersen ligitation.
H	Order denying Andersen's motion for preliminary injunction in previous Andersen ligitation.
I	Federal Circuit decision affirming denials of preliminary injunction without opinion
J	Order dismissing Andersen's prior litigation with prejudice.
K	U.S. Patent No. 6,129,731
L	U.S. Patent No. 6,464,240
M	U.S. Patent Publication No. 2003/0052472
N	Claim amendments filed by Andersen on March 3, 2018 in the '412 patent reexamination proceeding
O	July 3, 2017 office action issued by United States Patent Office in the '412 patent reexamination proceeding
P	U.S. Patent No. 5,398,411
Q	March 3, 2017 office action issued by United States Patent Office in the '510 patent reexamination proceeding
R	Ex Parte Grayson and Crecelius
S	U.S. Patent No. 3,321, 950
T	Letter from Plaintiff's counsel to Defendant's counsel
U	Terminal Disclaimer for U.S. Patent No. 7,222,510

EXHIBIT LIST FOR WYERS DECLARATION

A	Photograph of one of two aluminum I-beam extrusions made by Wyers Products Group, Inc.
B	Photograph of second of two aluminum I-beam extrusions made by Wyers Products Group, Inc.
C	Photograph of one of two dies used to make the aluminum I-beam extrusions used by Wyers Products Group, Inc.
D	Photograph of second of two dies used to make the aluminum I-beam extrusions used by Wyers Products Group, Inc.
E	Photograph of one of two ball mount dies used by Wyers Products Group, Inc.
F	Photograph of second of two ball mount dies used by Wyers Products Group, Inc.

G	Photograph showing the Wyers I-beam and the product remaining following Wyers's CNC machining process
H	Photographs of the two versions of Wyers's aluminum vertically adjustable drop bars

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of March, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

Michael K. Friedland	2mkf@kmob.com
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s/Amy Hennig
AMY HENNIG